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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 FEDERAL TRADE COMMISSION,

Case No. 2:18-CV-30 JCM (PAL)

8 Plaintiff(s),

ORDER

9 v.

10 CONSUMER DEFENSE, LLC, et al.,

11 Defendant(s).
12

13 Presently before the court is receiver Thomas W. McNamara's motion for authorization to
14 sell real property and vehicles. (ECF No. 101). Defendants Consumer Defense, LLC (Utah);
15 Preferred Law, PLLC; American Home Loan Counselors; Consumer Defense Group, LLC;
16 American Home Loans, LLC; AM Property Management, LLC; FMG Partners, LLC; Brown
17 Legal, Inc.; Zinly, LLC (collectively "Utah entities"); Jonathan P. Hanley and Sandra X. Hanley's
18 (collectively "the Hanleys") filed a response (ECF No. 103), to which McNamara replied (ECF
19 No. 105). The Federal Trade Commission ("FTC") filed a non-opposition. (ECF No. 102).

20 Also before the court is the FTC's motion to strike. (ECF No. 118). The Utah entities and
21 the Hanleys filed a response (ECF No. 128), to which the FTC replied (ECF No. 129).

22 Also before the court is a stipulation to extend time to file a response to the FTC's motion
23 to strike. (ECF No. 123).

24 Also before the court is the FTC's motion for entry of clerk's default. (ECF No. 126). The
25 relevant defendants have not filed a response and the time to do so has passed.

26 Also before the court is the FTC's motion to admit Jason D. Schall to practice in the District
27 of Nevada. (ECF No. 127).
28

1 Also before the court is the Utah entities and the Hanleys' motion for release of funds.
2 (ECF No. 133). The FTC filed a response (ECF No. 138) to which the Utah entities and the
3 Hanleys replied. (ECF No. 141).

4 Also before the court is the Hanleys' second motion for release of funds. (ECF No. 158).
5 The FTC filed a response (ECF No. 164), to which the Hanleys replied. (ECF No. 168).

6 Also before the court is the Hanleys' motion to strike. (ECF No. 160). The FTC filed a
7 response. (ECF No. 167). The Hanleys did not file a reply and the time to do so has passed.

8 **I. Facts**

9 The instant case arises from the Utah entities; Consumer Defense, LLC (Nevada);
10 Consumer Link, LLC; the Hanleys; and Benjamin Horton's (collectively "defendants") allegedly
11 fraudulent mortgage assistance relief services ("MARS"). (ECF No. 1). The FTC alleges the
12 following facts:

13 Defendants began to perpetrate the MARS scheme in 2011, in which they would collect
14 advance fees from consumers and promise to obtain mortgage loan modifications that would stop
15 or prevent foreclosure. *Id.* Once defendants initiated the loan modification process, they would
16 instruct consumers not to pay their mortgages and not to contact or respond to their lenders. *Id.*

17 Defendants typically failed to obtain mortgage loan modifications. *Id.* As a result,
18 consumers found themselves with months of interest and missed payments added to their
19 mortgages and, in some cases, have faced foreclosure and bankruptcy. *Id.* Ultimately, defendants
20 used the MARS scheme to swindle consumers out of more than \$11 million. *Id.*

21 The MARS scheme was a common enterprise of eleven interrelated entities—the corporate
22 defendants, controlled by the Hanleys and Horton. (ECF No. 6). Most of the corporate defendants
23 interacted with consumers to provide MARS service contracts.¹ *Id.* The remaining entities
24 functioned as payment collectors and financial conduits that paid for required services, such as
25 websites and office spaces. *Id.*

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28 ¹ The corporate defendants that interacted with customers are Consumer Defense, LLC
(Nevada and Utah); Consumer Link, Inc.; Preferred Law, PLLC; American Home Loan
Counselors; Consumer Defense Group, LLC, f/k/a Modification Review Board, LLC.

1 The corporate defendants shared employees and commingled funds. *Id.* Moreover, when
2 interacting with consumers, the corporate defendants “blurred corporate distinctions” by
3 intermingling contacts, forms, and consumer payments. *Id.* The FTC therefore contends that the
4 corporate defendants were a “maze of interrelated companies” that “jointly participated in a
5 ‘common venture’ in which they benefitted from a shared business scheme . . .” *Id.* (citations
6 omitted).

7 Horton and the Hanleys formed the pertinent business entities together. (ECF No. 54).
8 Jonathan Hanley controlled and operated the majority of the corporate defendants. (ECF No. 63).
9 Sandra Hanley managed nearly all the corporate defendants, handled the payroll, and responded
10 to chargebacks on defendants’ merchant accounts. *Id.* Ms. Hanley was also a representative who
11 negotiated mortgage loan modifications pursuant to consumer contracts. *Id.*

12 Horton, the only attorney who worked with the Hanleys, allegedly “served as a front for
13 [d]efendants’ claim that they [would] provide expert legal assistance to consumers to negotiate
14 mortgage loan modifications.” (ECF No. 6). Moreover, Horton was the owner, manager, and
15 attorney for Preferred Law, PLLC, (“Preferred Law”), which Horton dissolved due to the
16 suspension of his Utah bar license. (ECF Nos. 6, 54).

17 The FTC filed the underlying complaint on January 8, 2018, alleging six causes of action
18 pursuant to Section 5(a) of the Federal Trade Commission Act (“FTC act”), 15 U.S.C. § 45(a)
19 against all defendants. (ECF No. 1). The causes of action in the complaint are as follows: (1)
20 deceptive representations regarding substantially more affordable loan payments, substantially
21 lower interest rates, or foreclosure avoidance; (2) deceptive representations regarding loan
22 modification services; (3) advance payments for mortgage assistance relief services; (4) prohibited
23 representations; (5) material misrepresentations; (6) failure to disclose. *Id.*²

24 On February 20, 2018, the court granted the FTC’s motion for preliminary injunction,
25 which maintained the asset freeze that the court set in place with a temporary restraining order on
26 January 10, 2018. (ECF Nos. 12, 55). On February 23, 2018, the parties stipulated to release the

27
28 ² Counts (3) – (6) assert violations of the MARS Rule, 12 C.F.R. Part 1015, which
constitute unfair or deceptive acts or practices in or affecting commerce under Section 5(a) of the
FTC Act, 15 U.S.C. § 45(a). *Id.*

1 Hanleys' personal bank account from the asset freeze. (ECF No. 62). On February 28, 2018, the
2 parties also stipulated to release \$25,000 for defendants' attorney's fees. (ECF Nos. 65, 67).

3 On March 21, 2018, the corporate defendants and the Hanleys appealed the preliminary
4 injunction. (ECF No. 81). On May 4, 2018, the court granted the Hanleys' motion for release of
5 funds, in which court authorized the release of \$6,300 a month for a period of six months and
6 \$30,000 for attorney's fees. (ECF No. 104).

7 Now, the parties have filed several motions requesting various forms of relief. (ECF Nos.
8 101, 118, 123, 126, 127, 133, 158, 160).

9 **II. Legal Standard**

10 *a. Motion to strike pursuant to Federal Rule of Civil Procedure 12(f)*

11 Federal Rule of Civil Procedure 12(f) provides that "[t]he court may strike from a pleading
12 an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R.
13 Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and
14 money that must arise from litigating spurious issues by dispensing with those issues prior to trial
15 . . ." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).

16 *b. Clerk's entry of default*

17 Federal Rule of Civil Procedure 55(a) authorizes the clerk to enter default where a party
18 "has failed to plead or otherwise defend as provided by these rules and that fact is made to appear
19 by affidavit or otherwise." Fed R. Civ. P. 55(a).

20 A defendant must serve an answer within twenty-one days after being served with the
21 summons and complaint, unless another time is specified by the rule or by federal statute, or
22 defendant has timely waived service. Fed. R. Civ. P. 12(a)(1)(A). However, if a defendant files a
23 Rule 12 motion and "the court denies the motion or postpones its disposition until trial, the
24 responsive pleading must be served within 14 days after notice of the court's action." Fed. R. Civ.
25 P. 12(a)(4)(A).

26 **III. Discussion**

27 The court is currently considering eight motions that the litigants have filed. Three of these
28 eight motions, (ECF Nos. 101, 133, 158), request relief that is related to the asset freeze that the

1 court issued pursuant to the preliminary injunction that the court issued on February 20, 2018.
2 Because the corporate defendants and the Hanleys have appealed the preliminary injunction, the
3 court first addresses its jurisdiction over the asset freeze before proceeding to resolve the pending
4 motions.

5 *a. Jurisdiction*

6 “Once a notice of appeal is filed, the district court is divested of jurisdiction over the
7 matters being appealed.” *Natural Res. Def. Council v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th
8 Cir. 2001) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per
9 curiam)). The purpose of this rule “is to promote judicial economy and avoid the confusion that
10 would ensue from having the same issues before two courts simultaneously.” *Id.*

11 This rule “is a creature of judicial prudence, however, and is not absolute.” *Masalosalo v.*
12 *Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983). With regards to a final judgment in an
13 action for an injunction or a receivership, and any proceedings taken to enforce it, the district court
14 retains jurisdiction. *See* Fed. R. Civ. P. 62(a). This exception also includes orders to pay
15 disgorgement. *See SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990) (“The SEC’s power to obtain
16 injunctive relief has been broadly read to include disgorgement of profits realized from violations
17 of the securities law.”) (citations omitted).

18 Further, the Ninth Circuit has recognized that the district courts have an inherent power to
19 “preserve the status quo during the pendency of an appeal.” *Natural Resources Def. Council, Inc.*,
20 242 F.3d at 1166. Because the three motions that pertain to the asset freeze request relief that
21 would affect the status quo of the estate, either by selling assets or releasing funds, this court is the
22 appropriate forum to decide the merits of those motions.

23 Accordingly, the court hereby proceeds to adjudicate the pending motions in turn.

24 *b. Authorization for sale of real property and vehicles*

25 McNamara request that the court authorize the private sale of an office condominium
26 located at 41 West 9000 South, Sandy, Utah 84070 (“Sandy office”) and a residential
27 condominium located at 8165 Royal Street East #9, Park City, Utah 84060 (Parks condominium”).
28 (ECF No. 101). McNamara also requests that the court authorize the sale of the following four

1 vehicles: (1) 2014 Porsche Carrera 4S; (2) 2008 Mercedes Benz S550; (3) 2007 Chevrolet
2 Suburban; and (4) 2015 Forest River Viking V-Tree Camping Trailer. *Id.* The Utah entities and
3 the Hanleys argue that the court cannot authorize the sale of property under receivership until there
4 is a finding of liability. (ECF No. 103). The counter-movants are incorrect. Courts regularly
5 freeze assets with a preliminary injunction and authorize the sale of those assets prior to finding
6 liability in order to preserve the value of the estate. *See, e.g., F.T.C. v. Johnson*, No. 2:10-cv-
7 02203-RLH-GWH, 2011 WL 3841039 (D. Nev. Aug. 26, 2011); *see also, e.g., S.E.C. v. TLC*
8 *Investments and Trade Co.*, 147 F. Supp. 2d 20131, 1036 (C.D. Cal. 2001) (“First, Liquidation at
9 this time, prior to entry of judgment, is appropriate because . . . ongoing management alone will
10 drain money out of the estate . . .”).

11 Courts may direct an appointed receiver to arrange the private sale of property if the court
12 finds that doing so would serve the best interests of the estate. 28 U.S.C. § 2001(b). In ordering
13 a private sale, § 2001(b) requires the court to “appoint three disinterested persons to appraise such
14 property” and to not confirm a private sale “at a price less than two-thirds of the appraised value.”
15 *Id.* However, 28 U.S.C. § 2004 gives district courts the discretion to deviate from the standard set
16 in Section 2001(b), allowing courts authorize sale of *personal property* without three disinterested
17 appraisals. 28 U.S.C. § 2004; *United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996).

18 The Sandy office is subject to a matured promissory note in the amount of \$510,000 and
19 monthly office association assessments in the amount of \$549.04. (ECF No. 101-1). The
20 outstanding amount owed to the association is \$3,000. *Id.* The Parks condominium is subject to
21 a delinquent loan, with at least \$25,000 due, and association dues of \$4,000 per quarter. *Id.* The
22 outstanding amount owed to the association is approximately \$19,000. *Id.*

23 McNamara represents that the estate does not have sufficient assets to service the liabilities
24 on the properties. *Id.* Moreover, the properties are likely to incur further obligations, such as
25 common assessments and property taxes, that will unnecessarily diminish the value of the estate.
26 Accordingly, the court will authorize private sale of the properties and appoint three neutral
27 appraisers pursuant to 28 U.S.C. § 2001(b). *See United States*, 83 F.3d at 1160.

1 As for the vehicles, which are incurring storage costs in excess of \$5,000 per year, are
2 inherently depreciating assets. *See* (ECF No. 101). Thus, selling the vehicles before they incur
3 further loss in value will maximize recovery and reduce costs for the receivership estate.

4 McNamara requests that the court authorize sale of the vehicles pursuant to 28 U.S.C. §
5 2004, which allows the court to deviate from the standards set forth in § 2001. *See* 28 U.S.C. §
6 2004; *United States*, 83 F.3d at 1160. Specifically, McNamara requests permission to use
7 commercially reasonable sales methods, such as receiving proposals from dealers and comparing
8 those offers with other sales avenues. (ECF No. 101).

9 Given the nature of automobile sales and the interest in favor of ensuring the largest return
10 to the receivership estate, McNamara's requested manner of sale would best preserve the value of
11 the estate. Thus, the court will exercise its "broad powers and wide discretion . . . in an equity
12 receivership" and authorize sale of the vehicles pursuant to § 2004. *S.E.C. v. Capital Consultants*,
13 LLC, 397 F.3d 733, 738 (9th Cir. 2005).

14 *c. Motion to strike pursuant to Federal Rule of Civil Procedure 12(f)*

15 As a preliminary matter, the court will grant the stipulation to extend time for defendants
16 to file a response to the FTC's motion to strike. Thus, the court will treat the Utah entities and the
17 Hanleys' response (ECF No. 128) as having been timely filed.

18 On July 2, 2018, the Utah entities and the Hanleys filed an answer that contained fourteen
19 affirmative defenses. (ECF No. 115). The FTC moves to strike the eighth, ninth, tenth and twelfth
20 of those defenses. (ECF No. 118).

21 *i. Eighth affirmative defense*

22 The Utah entities and the Hanleys' eighth affirmative defense is that any monetary relief is
23 subject to offset by benefits received by consumers, refunds paid to customers, business expenses,
24 and defendants' taxes. (ECF No. 115).

25 A monetary award to consumers in this case may reflect benefits that the consumers
26 received, including a reduction for any refunds. *FTC v. USA Financial, LLC*, No. 8:08-cv-899-T-
27 17MAP, 2009 WL 10671254 at *3 (M.D. Fla. Feb. 18, 2009); *FTC v. Bronson Partners, LLC et*
28 *al.*, No. 3:04-cv-1866(SRU), 2006 WL 197357 (D. Conn. Jan. 25, 2006). Moreover, the FTC

1 admits that refunds would offset the amount of any equitable monetary judgment. (ECF No. 118).
2 Accordingly, the court will deny the FTC's motion to strike as to these defenses.

3 However, there does not exist any authority in support of the Utah entities and the Hanleys'
4 assertion that costs, business expenses, or taxes should offset any monetary award. *See FTC*, 2006
5 WL 197357 at *2. Therefore, the court will grant the FTC's motion to strike as to these defenses.
6 *See Fed. R. Civ. P. 12(f)* ("The court may strike from a pleading any insufficient defense . . .").

7 *ii. Ninth affirmative defense*

8 The Utah entities and the Hanleys' ninth affirmative defense is that any monetary relief is
9 subject to offset by damages that the FTC caused when it moved for a temporary restraining order
10 and preliminary injunction. (ECF No. 115). The court is not aware of and the counter-movants
11 have not provided any authority showing that this is a proper affirmative defense. Accordingly,
12 the court will strike the Utah entities and the Hanleys' ninth affirmative defense for being an
13 "insufficient defense[.]" *Fed. R. Civ. P. 12(f)*.

14 *iii. Tenth affirmative defense*

15 The Utah entities and the Hanleys' tenth affirmative defense is that laches bars the FTC's
16 claims. (ECF No. 115).

17 Laches is not available against the federal government when it undertakes an action to
18 enforce a public right or to protect the public interest. *United States v. Summerlin*, 310 U.S. 414,
19 416 (1940); *See United States v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir. 1978). Here, the FTC
20 is seeking consumer redress, which renders this action an effort to enforce a public right or protect
21 the public interest. *See, e.g., FTC v. Moneymaker*, No. 2:11-cv-461-JCM(RJJ), 2011 WL 3290375
22 at *2 (striking a laches affirmative defense against the FTC in an enforcement action). Therefore,
23 the court will strike the tenth affirmative defense.

24 *iii. Twelfth affirmative defense*

25 The Utah entities and the Hanleys' twelfth affirmative defense is that waiver or estoppel
26 bar the FTC's claims. (ECF No. 115).

27 Waiver, like laches, is not available against the federal government when it undertakes an
28 action to enforce a public right or to protect the public interest. *See Donovan v. Schmoutey*, 592

1 F. Supp. 1361, 1403 (D. Nev. 1984). As the court discussed above, this case constitutes a
2 government action to enforce a public right or to protect the public interest. Thus, the Utah entities
3 and the Hanleys may not plead waiver as an affirmative defense.

4 Equitable estoppel, on the other hand, is a viable affirmative defense if the defendant
5 alleges some affirmative misconduct on the part of the government. *Ruby Co.*, 588 F.2d at 705;
6 *see also INS v. Hibi*, 414 U.S. 5, 8–9 (1973) (holding that estoppel does not apply to government
7 actions absent affirmative misconduct). However, if the defendant does not allege the necessary
8 elements, the defense fails as a matter of law. *See Donovan*, 592 F. Supp. at 1403 (“The estoppel
9 defense raised by defendants fails as a matter of law because defendants failed to allege its
10 necessary elements.”).

11 Here, the Utah entities and the Hanleys merely recite the word “estoppel” without
12 providing allegations of some affirmative misconduct on the part of the government. (ECF No.
13 115). Thus, the estoppel defense fails as a matter of law. *See Donovan*, 592 F. Supp. at 1403.

14 Accordingly, the court will strike the Utah entities and the Hanleys’ twelfth affirmative
15 defense.

16 *d. Clerk’s entry of default*

17 The FTC moves for clerk’s entry of default against defendants Consumer Defense, LLC
18 (Nevada) (“Consumer Defense”) and Consumer Link, Inc. (“Consumer Link”) due to the relevant
19 defendants’ failure to timely file a responsive pleading. (ECF No. 126).

20 On March 19, 2018, Consumer Defense and Consumer Link waived service of a summons
21 and complaint. (ECF Nos. 87, 90). At that time, Consumer Defense and Consumer Link had
22 already filed a Rule 12 motion to dismiss, which triggered the tolling period under Federal Rule
23 of Civil Procedure 12(a)(4)(A). (ECF No. 45).

24 On June 7, 2018, the court denied the Rule 12 motion to dismiss. (ECF No. 112). Pursuant
25 to the fourteen-day filing period under Rule 12(a)(4)(A), Consumer Defense and Consumer Link
26 had until June 31, 2018, to file and serve an answer. Because neither defendant filed an answer
27 by that deadline, the court will direct the clerk to enter default.

28 . . .

1 *e. Motion to admit government attorney*

2 The FTC requests that the court admit government attorney Jason D. Schall to practice in
3 the District of Nevada for all matters in this district, including this action, during the period of his
4 employment with the United States. (ECF No. 127).

5 With respect to admission of a government attorney, the Local Rules provide in pertinent
6 part:

7 Unless the court orders otherwise, any attorney who is a member in good standing
8 of the highest court of any state, commonwealth, territory, or the District of
9 Columbia, who is employed by the United States as an attorney and has occasion
10 to appear in this court on behalf of the United States, is entitled to be permitted to
11 practice before this court during the period of employment upon motion by the
employing federal entity, the United States Attorney, the United States Trustee's
Office, or the Federal Public Defender for this district or one of the assistants.

12 LR IA 11-3.

13 The FTC has filed a proper motion under the Local Rules in which the FTC represents that
14 Jason D. Schall is “an active member in good standing of the Bar of the State of New York (Bar
15 No. 4288437) and the Bar of the District of Columbia (Bar No. 495070).” (ECF No. 107). Good
16 cause appearing, the court will grant the FTC’s motion to admit Jason D. Schall to practice in the
17 District of Nevada.

18 *f. Motion for release of funds*

19 The Utah entities and the Hanleys request that the court release \$27,043.04 for attorney’s
20 fees. (ECF No. 133).

21 The release of funds for attorney’s fees lies within the discretion of the court. *See United*
22 *States v. Monsanto*, 491 U.S. 600, 615-16 (1989). The lack of availability of other funds and the
23 fact that the defendants have not yet been found liable for the alleged wrongdoing are
24 considerations courts have evaluated when determining whether to release funds for attorney’s
25 fees. *Commodity Futures Trading v. Noble Metals Int’l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995)
26 (“Discretion must be exercised by the district court in light of the fact that wrongdoing is not yet
27 proved when the application for attorney fees is made.”).

1 The Utah entities and the Hanleys have mailed an *in camera* submission, which includes
2 an itemization of the attorney's fees that they incurred from February 2018 through August 2018.
3 *See* (ECF No. 134). In light of the complex nature of this lawsuit, the quality of the work
4 performed, ongoing discovery, and the several motions that the movants litigated in the relevant
5 time period, \$27,043.04 constitutes a reasonable fee.

6 While the court recognizes the importance of competent representation, the court is at least
7 equally conscious of the public interest in asset preservation for redress purposes. *See World Wide*
8 *Factors*, 882 F.2d at 348 (approving limitation on attorney's fees "out of concern for preserving
9 funds for ultimate distribution to defrauded customers"). Accordingly, after weighing several
10 competing interests here, the court will authorize the release of funds for the Utah entities and the
11 Hanleys' attorney's fees in the amount of \$27,043.04.

12 *g. Second motion for release of funds*

13 The Hanleys request that the court release an additional \$30,000 for attorney's fees and an
14 additional \$6,300 per month for living expenses. (ECF No. 158).

15 On May 4, 2018, the court authorized the release of living expenses in the amount of \$6,300
16 per month for a period of six months. (ECF No. 104). The court also held that it authorized the
17 release of monthly living expenses for a period of six months in order to afford the Hanleys
18 reasonable time to secure adequate employment to support the basic needs of their family. *Id.*

19 The six-month period has expired and the Hanleys have not provided any evidence showing
20 that they attempted to secure employment in good faith. The Hanleys failure to take advantage of
21 the opportunity that the court provided cannot justify further diminishing the estate. Accordingly,
22 the court will not authorize the release of living expenses.

23 As for attorney's fees, the Hanleys have complied with the court's previous order requiring
24 the Hanleys provide an itemization of attorney's fees. *See* (ECF No. 134). The court has reviewed
25 the itemized submission and, as discussed above, finds that the legal fees with respect to the funds
26 which the court has already released are reasonable.

27 Accordingly, the court will authorize the release of an additional \$30,000 in attorney's fees
28 so that the Hanleys may secure adequate representation. *See World Wide Factors*, 882 F.2d at 348

1 (approving limitation on attorney's fees "out of concern for preserving funds for ultimate
2 distribution to defrauded customers"). The Hanleys shall submit an exact itemization documenting
3 the use of the funds. At that time, the court will evaluate the reasonableness of the attorney's fees
4 and the potential subsequent release of attorney's fees as this litigation proceeds.

5 *h. Motion to strike declaration*

6 The Hanleys move to strike Ecco Debnam's declaration (ECF No. 7 at PX03) on the
7 grounds that it contains numerous false claims that are inconsistent with a prior deposition
8 testimony. (ECF No. 160). The motion primarily consists of arguments attacking Debnam's
9 credibility. *See id.* The only statement that the Hanleys specifically identify as being false is
10 paragraph six of the declaration, in which Debnam states, "Preferred Law told me not to make any
11 more payments on my mortgage or talk to my lender." *Id.*; *see also* (ECF No. 7 at PX03).

12 Pursuant to the sham affidavit doctrine, "a party cannot create an issue of fact by an
13 affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d
14 262, 266 (9th Cir. 1991). The doctrine does not preclude a party "from elaborating upon,
15 explaining or clarifying prior testimony[.]" *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998–
16 99 (9th Cir. 2009) (internal quotations omitted). However, when the circumstances clearly and
17 unambiguously show that the contradiction is a sham, the court may strike the document. *Id.*; *see*
18 *also Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012).

19 Here, defendants have not deposed Debnam. Thus, there does not exist prior deposition
20 testimony for Debnam to contradict in his sworn declaration. Accordingly, the court will deny the
21 Hanleys' motion to strike Debnam's declaration.

22 **IV. Conclusion**

23 Accordingly,

24 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that McNamara's motion for
25 authorization to sell real property and vehicles (ECF No. 101) be, and the same hereby is,
26 GRANTED, consistent with the foregoing.

1 IT IS FURTHER ORDERED that McNamara shall file with this court within seven (7)
2 days from the date of this order a proposed order that explicitly appoints three proposed appraisers
3 by name, among the other required findings of fact, conclusions of law, and orders therein.

4 IT IS FURTHER ORDERED that the FTC's motion to strike (ECF No. 118) be, and the
5 same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

6 IT IS FURTHER ORDERED that the stipulation to extend time to file a response to the
7 FTC's motion to strike (ECF No. 123) be, and the same hereby is, GRANTED.

8 IT IS FURTHER ORDERED that the FTC's motion for clerk's entry of default (ECF No.
9 126) be, and the same hereby is, GRANTED.

10 The clerk shall enter default as to defendants Consumer Defense, LLC (Nevada) and
11 Consumer Link, Inc. pursuant to Federal Rule of Civil Procedure 55(a).

12 IT IS FURTHER ORDERED that the FTC's motion to admit Jason D. Schall to practice
13 in the District of Nevada (ECF No. 127) be, and the same hereby is, GRANTED.

14 IT IS FURTHER ORDERED that the Utah entities and the Hanleys' motion for release of
15 funds (ECF No. 133) be, and the same hereby is, GRANTED, consistent with the foregoing.

16 IT IS FURTHER ORDERED that the Hanleys' second motion for release of funds (ECF
17 No. 158) be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the
18 foregoing.

19 IT IS FURTHER ORDERED that the Hanleys' motion to strike (ECF No. 160) be, and the
20 same hereby is, DENIED.

21 DATED January 17, 2019.

22 
23 _____
24 UNITED STATES DISTRICT JUDGE
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